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In the Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP., INC., UNION TRUST COMPANY, and CITICORP, PETITIONERS

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

and

BRIEF OF FRANK L. MORSANI, INDIVIDUALLY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.3 of the Rules of this Court, Frank L. Morsani, by and through his undersigned attorneys, Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., respectfully seeks leave to file the attached brief as *amicus curiae* in support of petitioners. The consent of counsel for petitioners has been granted; the consent of counsel for respondents has been withheld.

Amicus is Frank L. Morsani, taking a position as a small businessman and private citizen and borrower from multiple banking institutions. *Amicus* is Vice Chairman of the Board of the United States Chamber of Commerce and was past Chairman of the Council of Small Business of the United States Chamber of Commerce but *amicus* emphasizes that he is not taking a position as a member or officer of the United States Chamber of Commerce.

Amicus is a principal in several business entities having multi-state activities primarily, but not exclusively, in the Southeastern portion of the United States.

While *amicus* is a Florida small businessman and not directly affected by the Connecticut and Massachusetts' statutes, all bank customers or shareholders in similar positions will be affected and will have an interest in the outcome of the litigation. *Amicus* is a Florida resident and Florida has enacted a statute which basically allows only the old Confederacy to join its banking forces. Fla. Stat. §658.295 (1984). If exclusive banking regions are encouraged a banking structure will be created and governed by narrow state interests, subject to the worst influences of pork barrel, local interest lobbying and economic isolation pressures, and not by the general marketplace competitive forces. Without such competition bank customers will be adversely affected. Without the widest possible permissible state interaction between banks, efficiency will be sacrificed and costs will rise. Such costs will be passed along to the bank customer.

For small banks, competition for acquisition is an incentive to efficiency of performance and to the widest diversity of market and penetration of market. Enhancement as a target bank is sought by banks when acquisition opportunities abound. The small businessman such as *amicus* benefits from this incentive competition because his business is sought by the target banks to help the enhancement effort and to spread the cost of operations. Congress has always encouraged competition. The Connecticut and Massachusetts statutes discourage competition by the creation of an irrational, uneconomic and noncompetitive bank acquisition structure.

Obviously, regional banking compacts and their effects are not confined to Connecticut and Massachusetts. As the Southeastern region of the United States continues to grow by leaps and bounds, interstate banking is more important today than ever before. The region of direct consequence to *amicus* is the Southeast and the problem of regional banking hinders the forward movement of this area.

The banking industry is now artifically restricted by state borders. Lack of competition in the Southeast region will retard national growth. If the restrictions are loosened and the scope of the financial community is broadened, a growth spurt, led by small businesses given access to increased credit opportunity, will be unleashed which will benefit the entire United States.

Small business depends on commercial banks as the principal providers of funds for growth, marketing and development. Small business grows in direct relation with the manner it addresses its competition. Yet banks in parts of the United States are not permitted to cross state lines except arbitrarily. Such isolation insulates these banks from competition. Lack of competition, in turn, allows banks to make unreasonable demands upon the small businessmen who cannot reach the national money market. Lack of allowable competition prevents the incentive or necessity for the established out-of-state banking industry to tend to the needs of the small business community geographically remote.

Local banks at times are hard pressed to meet the needs of small business. Local small business people may be deprived of the many services out-of-state banks offer. The consequences of being unable to achieve access to the national money market are acutely felt by small businesses especially during periods of tight credit. Furthermore, due to a local bank's desire to avoid establishing a high line of credit with any one individual business, the small businessman may be limited to a local bank, and further hampered in his quest to prosper. Any attempt to restrain banking, as this issue does, will affect both the internal growth and external acquisitions of *amicus* and other entrepreneurs.

Because of the foregoing, *amicus* has a strong interest in the outcome of this litigation. Thus, *amicus* urges the Court to reverse the Second Circuit's interpretation of the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. §1842(d). Attached is the *amicus* brief designed to further clarify the issues and to clarify the practical problems created if the Connecticut and Massachusets statutes are upheld.

Respectfully submitted,

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February 21, 1985

QUESTIONS PRESENTED

This amicus brief will discuss the following questions:

1. Whether the Connecticut and Massachusetts statutes limiting bank holding company acquisitions are unconstitutional because the Douglas Amendment does not expressly authorize the states to discriminate against one another.

2. Whether an invalid multi-state compact was created by the Massachusetts and Connecticut legislation without congressional approval per the Compact Clause.

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INTEREST OF *AMICUS CURIAE*

As explained in the foregoing motion, Frank L. Morsani, an individual small businessman, has a vital interest in the outcome of the present litigation. The type of legislation at issue will result in higher costs, less efficiency and will distort and limit competition for bank acquisition. Banks and small businessmen will be adversely affected by the lack of competition for bank acquisition which encourages bank performance in dealing with customers. If the Connecticut and Massachusetts statutes are upheld, similar statutes are likely to be enacted leading to suppression of the American banking industry and limitation of competition.

STATEMENT OF THE CASE

For purposes of brevity, *amicus* will adopt by reference the Statement of the Case presented by the Petitioners.

SUMMARY OF ARGUMENT

The states cannot restrict the flow of interstate commerce in a discriminatory manner unless Congress has unmistakably by express statement provided the states with specific authority. The Douglas Amendment does not expressly provide such authority. The Douglas Amendment only provides authority for the states to permit out-of-state bank acquisition or deny out-of-state bank acquisition. The Douglas Amendment does not expressly allow selective discrimination of out-of-state bank acquisition.

Simple protectionistic state statutes which provide for other than evenhanded regulation should be stricken as invalid *per se* under the Commerce Clause unless the Congress has expressly allowed such discrimination. The Douglas Amendment does not allow such discrimination.

The Douglas Amendment should not be interpreted to provide for state restrictions on bank holding company activities. The Douglas Amendment only authorizes the states to permit out-of-state acquisition of local banks.

The Massachusetts and Connecticut statutes are part of a plan that creates a regional banking system which isolates the member states from the national banking community. The compact's effect is to enhance the sovereign powers of the member states to the potential detriment of federal supremacy. Absent explicit congressional approval, the compact violates the Compact Clause of the United States Constitution.

ARGUMENT

I. The Connecticut And Massachusetts Statutes Are Unconstitutional Because The Douglas Amendment Does Not Expressly Authorize States To Discriminate Against One Another.

Under the Commerce Clause, power to regulate commerce among the several states is vested in Congress. It is well settled that Congress may use its powers under the Commerce Clause to confer upon the states an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). There must be an "express statement" of congressional policy prior to finding that state regulation/discrimination is permissible. *South-Central Timber Development, Inc. v. Wunnicke*, _____ U.S. _____, _____, 104 S.Ct. 2237, 2242 (1984). In *South-Central*, this Court stated "there is no talismanic significance to the phrase 'expressly stated,' however; it merely states one way of meeting the requirements that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *Id.*

Only two positions are expressly stated and unmistakably clear in the Douglas Amendment (the "Amendment"). Initially, the Amendment expressly states that no out-of-state bank application for a state bank acquisition shall be approved. Clearly a state may, by omission, prevent all out-of-state bank holding company acquisitions of its local state banks. By way of exception, the Amendment provides for the specific authorization by state statute local state bank acquisitions by out-of-state bank holding companies. Clearly, a state may allow all out-of-state bank holding company acquisitions of its local state banks by statute. This dichotomy, prevent or permit, is the only unmistakably clear statement of Congress that can be gleaned from the Amendment.

It is impossible to discern that Congress made an express statement which unmistakably and clearly gave the states the

right to pick and choose which out-of-state banks should be allowed the privilege of acquisition. A logical extension of the Connecticut argument would allow a state to prevent the acquisition of some of its banks while allowing the acquisition of other of its banks. For example, the Douglas Amendment does not expressly allow Florida to enact a statute allowing the out-of-state bank acquisition of Dade County banks while preventing out-of-state bank acquisition of other Florida county banks. It is absurd to suggest that Congress intended to confer upon the states such discriminatory powers.

This Court has, in matters concerning express deference under the Commerce Clause, upheld state statutes which authorize evenhanded regulation while striking, under a virtual *per se* rule of invalidity, other statutes authorizing protectionistic discrimination. *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). The New England states in this case have not presented evenhanded statutes for review. Their statutes are precisely the type of simple economic protectionism and discrimination regularly stricken as invalid *per se* absent an unmistakably clear statement of Congress allowing the discrimination and protection.

In *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980) this Court determined that the language of the Amendment does not authorize state restrictions of any nature on bank holding company activities. The Amendment does establish a general federal prohibition and grants the states the authority to permit expansion of banking across state lines. *Id.* at 47. The New England statutes in issue permit selective expansion across state lines, an act which is not clearly authorized by Congress, and act which constitutes direct state restriction on certain bank holding companies contrary to the holding in *Lewis*.

The Amendment, as stated in *Lewis*, was a permissive enactment. *Id.* It was not a complete renunciation of all federal terest in interstate banking acquisition. In the Amendment, Congress did not even discuss the question whether states should have the power to discriminate among out-of-state

banks. The Federal Reserve Board erred in finding a renunciation and complete deferral to the states by Congress. There is nothing in the legislative history of the Amendment to suggest that Congress considered potential discrimination, let alone that Congress specifically, clearly, and unmistakably authorized such discrimination. Congress intended to defer only to valid state laws. *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Congress has maintained Federal supervision and control over the development of bank holding companies. The Commerce Clause's proscriptions have not been deferred by Congress so as to allow the states to ignore irrationally and arbitrarily the economic isolation and protectionism prohibitions of the Commerce Clause and other constitutional safeguards. As this Court has recently stated in two separate cases:

> "It is...beyond doubt that the Commerce Clause itself furthers strong federal interest in preventing economic Balkanization."

Bacchus Imports, Ltd. v. Dias, _____ U.S. _____, _____, 104 S. Ct. 3049, 3053 (1984);

> "The Commerce Clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.' "

South-Central Timber Development, Inc. v. Wunnicke, _____ U.S. _____, _____, 104 S.Ct. 2237, 2242 (1984).

II. The Connecticut And Massachusetts Statutes Are Unconstitutional Because They Are An Unauthorized Interstate Compact In Violation Of The Compact Clause Of The United States Constitution.

This Court has long recognized the Compact Clause as requiring congressional authorization of any agreement or compact among the states which tends to increase the states' political power or which encroaches upon the welfare of the Federal union. *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976). In *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), this Court expressly recognized that potential, rather than actual, impact upon Federal supremacy is the standard by

which challenges under the Compact Clause must be measured. *Id.* at 472. Under this standard, the New England Banking Compact created by the Massachusetts and Connecticut legislation is precisely the type of arrangement that requires Congressional authorization under the Compact Clause.

In *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854), this Court had included within the umbrella of Federal supremacy the need to "guard the rights and interests of the other States, and to prevent any compact or agreement between any two States which might affect injuriously the interests of the others." *Id.* at 494. The New England Banking Compact potentially encroaches upon and interferes with Federal supremacy since, through the Douglas Amendment, Congress only expressly deferred to the states the authority to permit interstate banking acquisitions. Because Congress did not specifically permit state discrimination against out-of-state entrants, however, the New England Banking Compact at least potentially encroaches the Constitutional and congressional mandate against discrimination in interstate commerce and therefore must be congressionally authorized. Because Congress has neither considered nor approved the New England Banking Compact, the Massachusetts and Connecticut statutes at issue herein should be held invalid and of no force and effect.

A practical effect of the New England Banking Compact is the creation of an artificial barrier that isolates the member states' banking institutions from the national banking markets. As a consequence, non-member states will be forced to retaliate by establishing similar banking regions to protect their banking institutions and constituents. The resulting revival of an economic Confederacy to combat an economic New England is neither the goal of the Douglas Amendment nor is it a lawful option under the Compact Clause.

CONCLUSION

The judgment below should be reversed.

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